

COASTAL ZONE  
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ACTIVITY NUMBER 9

Legal and Institutional

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New York State Coastal Zone Management Program

## ACTIVITY NO. 9 - LEGAL AND INSTITUTIONAL

### General Description

The purpose of this program activity is to continue to evaluate and compare existing legislation and governmental responsibilities affecting the State's coastal zone area and identify alternative institutional arrangements as well as additional authorities required to implement the State's Coastal Zone Management Program.

### TASK 9.1

#### STATEMENT OF TASK

Update and Expand Inventory and Analyses of Existing Federal and State Legislation and Regulations.

### Products Expected

1. Review and expand inventory of existing Federal and State legislation and regulations prepared in the first year.

#### DOS

#### Progress

50% complete - DOS legal staff has reviewed earlier work on State law as regards municipalities, and the first report will be revised to reflect certain changes in State statutes. In addition, Federal CZM legislation has been analyzed.

#### Prognosis

This work will require more attention as the CZMP organization and authorities efforts increase in pace. Further, the State legislature is currently in session and any initiatives it may take in this area will have to be taken into account.

DEC

Progress

90% complete - (See Task 4.1). An updating has been made of the first year report, an inventory and analysis of existing State programs which have impacts on or upon the coastal zone and includes references to the legislation and regulations upon which such programs are based.

Prognosis

Additional analysis may be required to develop recommendations to accomplish the work set forth in Task 9.3, identifying alternative institutional arrangements.

2. Prepare memoranda setting forth additional needs, recommendations, and other program requirements will be prepared as necessary.

DOS

Progress and Prognosis

The memoranda will be prepared at the close of the program year.

DEC

Progress and Prognosis

10% complete - Increasing attention by legal staff along with regular CZM staff should provide, by the end of March, papers identifying needs and gaps in legal and institutional arrangements for subsequent consideration in Task 9.3 and for future public discussion in Year III work.

INVENTORY OF LOCAL LAND USE POWERS  
WHICH MIGHT IMPLEMENT COASTAL ZONE POLICIES

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INVENTORY OF LOCAL LAND USE POWERS  
WHICH MIGHT IMPLEMENT COASTAL ZONE POLICIES

I. BACKGROUND

Local governments have four basic types of powers that might be used to implement coastal zone policies. These are the powers of taxation, eminent domain, the power to provide for capital facilities and the police power. This inventory will concentrate on the power to control the use of land through the exercise of the police power. It is the purpose of the inventory to include a complete list of powers which may be consulted to provide guidance when specific coastal zone policies, goals or objectives are decided upon for implementation.

Before discussing the local power to control land use, it will be useful to briefly describe the other three powers - taxation, eminent domain and provision of capital facilities.

Taxation

The real property tax is the major source of local revenues in New York State. More importantly for purposes of this discussion, it is administered locally, subject to the requirements imposed by the State Real Property Tax Law. It should be obvious that the assessment of real property and the subsequent levy of taxes will strongly influence its use. Higher taxes may encourage sale or development. Lower taxes may discourage development, and they can ameliorate an otherwise harsh effect of restrictive land use controls. Another way

in which taxation works to influence land use policies is through exemptions. Exemptions from real property taxation may only be granted by the State Legislature, and only by general law (N.Y. Constitution, Article 16, section 1 (McKinney 1969)). Uses which benefit from partial or complete tax exemption include public housing, industrial development agencies, railroads, air pollution control facilities, industrial waste treatment facilities and forest lands. An important use of real property tax powers to influence land use is the Agricultural Districts Law (Agriculture and Markets Law, Article 25 AA (McKinney 1972; McKinney Supp. 1975-1976)). This law authorizes the assessment of agricultural land at its value for agricultural purposes in certain circumstances. Other uses of the real property tax to influence the use of land in ways that might relate to coastal zone policies are authorized by General Municipal Law, section 247 (McKinney 1974), permitting valuation of real property to reflect acquisition by the local government of any interest therein for open space purposes; and General Municipal Law, section 96-a (McKinney Supp. 1975-1976) authorizing the limitation of taxes where local restrictions constitute a "taking" of property.

While administration of the real property tax is local, the major drawback in attempting to use it to influence the use of land is that State law is quite specific in providing for the way in which it is administered. For example, State law requires all property to be assessed at its full market

value (Real Property Tax Law, section 306 (McKinney 1972); see Hellerstein v. Assessor of Town of Islip, 37 N.Y.2d 1; 371 N.Y.S.2d 388 (1975)). This prevents local assessment of certain kinds of land uses (e.g. open space or farming) at lower percentages of full value than other uses, unless there is other State legislation specifically authorizing it (as, for example, the Agricultural Districts Law). The same rule applies to exemptions. The only permissible exemptions from taxation are those contained in Real Property Tax Law, Article 4 (McKinney 1972; McKinney Supp. 1975-1976); while some are permissive, the list contained in Article 4 is exclusive.

#### Provision of Capital Facilities

Another important mechanism whereby a municipality impacts the use of land within its boundaries is that of the furnishing of improvements. Such improvements may be included in a capital improvement program over a six-year period (N.Y. General Municipal Law, § 99-g (McKinney Supp. 1975-1976) or pursuant to other statutory authority (N.Y. Town Law, Article 14 (McKinney 1975-1976); N.Y. Village Law, Article 6 (McKinney 1973); N.Y. General City Law, § 20 (McKinney Supp. 1975-1976)).

#### Eminent Domain

Eminent domain is the inherent power of the sovereign state to take (or authorize the taking of) private property for public purposes, upon payment of just compensation, without the consent of the owner (McQuillan, Municipal Corporations,

3rd Edition (Revised), section 32.02). Counties, cities, towns and villages in New York State all have been granted eminent domain powers by statute (County Law, section 215 (McKinney 1972); General City Law, section 20(2) (McKinney Supp. 1975-1976); Town Law, section 64(2) (McKinney 1962); Village Law, section 6-624 (McKinney 1973)).

The power is useful in the acquisition of any kind of real property, with or without improvements, subject, of course, to the limitation that it be acquired for a public purpose, that compensation be paid and that specified procedures be followed. In the coastal zone context, it should be noted that in addition to the general powers cited above to acquire property, counties, cities, towns and villages have broad powers under General Municipal Law, section 247 (McKinney 1974) to acquire property - or interests in property - for open space purposes.

The obvious drawback of the eminent domain power is that acquisition of property costs money.

## II. LAND USE CONTROL POWER - THE POLICE POWER

The power of government to control the use of private property is an exercise of the police power. The police power has been defined as the power of government to provide for the public order, peace, health, safety, morals and general welfare (McQuillan, Municipal Corporations, 34d Ed. (Revised), section 24.04). The police power inherently resides in the sovereign state, but it may be delegated by the state to its municipalities. As will be seen below, this has been done in New York State in the area of land use controls.

Even before the United States Supreme Court had given its approval to a comprehensive zoning ordinance in the Village of Euclid v. Amber Realty case (272 U.S. 365 (1926)), it had, in two landmark cases, upheld the right of a municipality to regulate the uses of private property as an exercise of the police power. The case of Hadacheck v. Sebastian (239 U.S. 394) decided in 1915, concerned an ordinance of the City of Los Angeles which made it unlawful for any person to establish a brick yard or brick kiln within residential districts. The Supreme Court held that the prohibition was a proper exercise of the police power, which it characterized in this manner:

"It is to be remembered that we are dealing with one of the most essential powers of government, one that is the least limitable. It may, indeed, seem harsh in its exercise, usually is on some individual, but the imperative necessity for its existence precludes any limitation upon it when not exerted arbitrarily."

Also, earlier (1909), the United States Supreme Court had upheld a regulation dividing Boston into two maximum height districts, permitting greater building height in the downtown area, upholding the regulation on the ground that it protected residential areas from the danger of tall buildings collapsing because of fire (Welch v. Swazey, 214 U. S. 91).

Against this background, it is important to note, for our purposes, that land use controls are an exercise of the police power and that they must, therefore, find their justification in the police power exercised in the interest of the public (see Concordia Collegiate Institute v. Miller, 301 N.Y. 189, citing Nectow v. City of Cambridge, 277 U.S. 183), and that:

"The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare" (Concordia Collegiate Institute, cited above).

The exercise of the police power - including the power to control land use - is subject to a number of limitations. It must be reasonable and reasonably related to the end sought to be achieved. It must not be unduly oppressive, and it cannot be extended beyond the evil sought to be curbed (Streb v. City of Rochester, 222 N.Y.S.2d 813 (1961)). There must be a proper relationship between the controls imposed and the end sought to be achieved (People v. Gerus, 69 N.Y.S.2d 283 (1942)), they must in some degree tend to prevent offense or evil or to preserve public health, morals, safety or welfare (Avon Western

Corporation v. Wooley, 266 App. Div. 529; 42 N.Y.S.2d 690 (1943)). Finally, the exercise of the power must not be violative of the enabling legislation under which the power is exercised, or of constitutional safeguards (Village of Carthage v. Frederick, 122 N.Y. 268 (1890)).

With few exceptions - which are not considered here - the exercise of the police power to control land use is entirely a city, town or village function in New York State. This includes the decision whether to control land use at all, and, if it is decided to do so, the nature of the controls. When exercised, the power to control land use is governed by the State enabling statutes which have granted the power to local governments. Throughout this inventory, reference will be made to the General City Law, Town Law, Village Law, Municipal Home Rule Law and General Municipal Law.

The land use powers of local government fall into five general groupings: planning, zoning, subdivision control, the official map and miscellaneous. Each will be discussed in turn.

### III. PLANNING

Planning itself is not a land use control device. It is included in this inventory because it is relevant to the exercise of land use control powers in two important ways. First, there is a substantive statutory requirement that all zoning must be in accordance with a comprehensive plan. Second, the statutes permit a local government to provide a formal review of various municipal actions against the municipal comprehensive plan.

#### Zoning and the Comprehensive Plan

The zoning enabling statutes all require that regulations adopted thereunder be "in accordance with a comprehensive plan" (N.Y. Town Law, section 263 (McKinney 1965); N.Y. Village Law, § 7-704 (McKinney 1973); N.Y. General City Law, § 20 (McKinney 1968)).

The term "comprehensive plan" although the subject of much litigation, has never been defined. It need not be a written document nor a "plan" in the usual sense of the term. Rather, courts will look at the entire framework of documents, efforts and events which have formed the fabric of the planning process.

While there is still no precise definition of a comprehensive plan (and the term quite possibly does not lend itself to strict legal definition) courts zealously guard the legislative mandate and are quick to strike down regulations that are not,

or do not seem to be in accordance with such a plan. It is submitted that the salient point to bear in mind is that zoning is a legal tool in the planning process and the zoning ordinance must not be confused with the plan itself.

It would appear from an examination of the cases that although there has been little progress towards a definition of the "comprehensive plan" by the courts, the intent of the law must be satisfied. A reasonable community policy, however expressed, must in fact exist. Where unusual circumstances exist requiring zoning action varying from the accepted norm, courts will not sustain their validity in the absence of overall objectives designed to benefit the community as a whole. There can be no question from a planning point of view that to effectively utilize zoning it must be preceded by proper planning.

#### Review of Municipal Actions Against Plans

Cities, towns and villages all have power to create planning boards (General City Law, section 27 (McKinney 1968); Town Law, section 271 (McKinney 1965); Village Law, section 7-718 (McKinney Supp. 1975-1976)), and these boards have power to prepare and adopt comprehensive master plans. These boards, with their detailed knowledge of the municipality's comprehensive plan and the background of that plan, are in a unique position to give advice to other municipal agencies which are required to render decisions on various matters. Recognizing this, the

statutes governing cities and towns authorize municipal legislative bodies to provide, by general or special rule, for the reference of any matter or class of matters to the planning board for its review and report. These statutes permit (but do not require) the legislative body, when arranging for this kind of referral, to provide that final action on the matter (i.e., by the agency with decision power) shall not be taken until the planning board has submitted its report or has had a reasonable time to do so (General City Law, § 30 (McKinney Supp. 1975-1976); Town Law, § 274 (McKinney Supp. 1975-1976)). A parallel statutory authority for village was excluded from the recodified Village Law, effective September, 1973. It should be noted that these provisions in no way permit planning board approval of the matters referred. Its powers would be limited to review and a report of an advisory nature. A fairly common use of the referral provisions is the provision in many zoning ordinances of a procedure for referral to the local planning board of all applications for rezonings, variances and special permits. Planning boards may not be given approval power as to these matters, but the legislative body, in deciding upon a rezoning request, or the board of appeals, in deciding upon a variance or special permit, often finds planning board reports and recommendations of vital importance.

#### IV. ZONING

Zoning is the most significant of all the land use controls. It is the basic control by which the actual use of land may be prescribed, by which the density of use and intensity of use may be controlled, and by which uses may be regulated in such a way as to fit into the area they occupy with minimal disruption.

The power to enact zoning regulations is an exercise of the police power. As noted above, the police power is an inherent power of the sovereign state, but may be delegated to municipal legislative bodies. In New York State, the power to zone has been delegated to cities, towns and villages. There have been several exceptions to this delegation in recent years, involving partial exercise of the zoning power by the State itself in areas deemed to be of statewide importance. (See Executive Law, Article 27 (McKinney Supp. 1975-1976) (the Adirondack Park Agency); Environmental Conservation Law, Article 15, Title 27 (McKinney Supp. 1975-1976) (Wild, Scenic and Recreational Rivers); Article 24 (McKinney Supp. 1975-1976) (Freshwater Wetlands) and Article 25 (McKinney Supp. 1975-1976) (Tidal Wetlands).)

The specific delegation to cities, towns and villages of the zoning power is contained in General City Law, § 20(24) and (25) (McKinney 1968); Town Law, §§ 261, 262 and 263 (McKinney 1965) and Village Law, §§ 7-700, 7-702 and 7-704 (McKinney 1973). These enabling acts empower municipalities, for the purpose of promoting the health, safety, morals or

general welfare of the community (the police power) to regulate and restrict the height, number of stories and size of buildings and other structures, percentage of lot that may be occupied, the size of yards, courts and other open spaces, the density of population, and the use of buildings, structures and land for trade, industry, residence, or other purposes.

The term "zoning" stems from the fact that to accomplish these powers, the municipality may divide its territory into districts (or zones), with regulations in each such district different from those in other districts. The statutes require the regulations to be uniform within each district (although they may vary among the districts).

The statutes set forth the purposes of zoning regulations. They must be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; secure safety from fire, flood, panic and other dangers; to promote health and general welfare; to provide adequate light and air and prevent overcrowding of land and undue concentration of population. Also, they must facilitate adequate provision of transportation, water, sewage, schools, parks, and other public requirements.

Finally, the enabling acts also provide that these zoning regulations must be made with reasonable consideration to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land throughout the municipality.

A variety of controls are possible under the zoning power. Probably the most important use of zoning is to prescribe land uses. This is accomplished by listing in each district shown on the zoning map those land uses permissible. As discussed above, this listing of uses may be different for each district; indeed, this separation of uses by geographic area is the primary purpose of zoning. Density may be regulated through zoning by prescribing minimum lot sizes for single family homes (see Elbert v. North Hills, 262 App. Div. 856; 28 N.Y.S.2d 172 (1941)) and by permitting - or not permitting - denser types of residential construction, such as multi-family structures. Often, zoning ordinances prescribe a maximum number of dwelling units permissible in multi-family structures. Set-back restrictions are also commonly found in zoning regulations; these prescribe minimum front-yard, side-yard and rear-yard set-back restrictions. Imposition of such restrictions has been upheld as an appropriate exercise of the police power in that such requirements tend to insure light and air, decrease fire hazards and improve community appearance (Anderson, New York Zoning Law and Practice, 2d Ed., sections 7.10, 8.37).

Thus, we have the power and authority of local government in New York State to enact zoning regulations, by means of a delegation by the State of its police power, as contained in the enabling acts. But, as we have noted above, the exercise of the police power is not without limitations.

Limitations on the Exercise of the Zoning Power

The major limitations on the exercise of the zoning powers are constitutional and statutory. The constitutional limitations apply to any exercise of the police power, and thus to zoning. The statutory limitations are both substantive and procedural.

Perhaps the most important constitutional limitation is that zoning may not be so restrictive as to constitute the confiscation of property. This would be a misuse of the police power. While zoning may operate to reduce the value of an individual's loss, it may not be so restrictive as to destroy, or confiscate, its value for any use.

The Court of Appeals has held that the mere fact that zoning regulations depreciate the value of real property is not sufficient to invalidate them. The Court stated that depreciation of value is often the result of the exercise of the police power, and noted that the general welfare of the public is more important than the pecuniary profits of the individual (Wulfsohn v. Burden, 241 N.Y. 289 (1915); see also, Dauernheim, Inc. v. Town of Board of Hempstead, 33 N.Y.2d 468; 354 N.Y.S.2d 909 (1974)). Zoning regulations which greatly reduce the value of land will be upheld as long as some profitable use of the premises is possible (Anderson, New York Zoning Law and Practice, 2d Ed., section 2.14). Obviously, whether some profitable use of the premises is possible has to be determined on a case-by-case basis.

But where zoning regulations operate to deprive the owner of any use value for his premises, they are unconstitutional. In effect, such restrictions would constitute a taking of private property without due process of law, in violation of the 14th Amendment to the U. S. Constitution and Article 1, section 7 of the New York Constitution (McKinney 1969). Even though such restrictions are entirely in the public interest, and serve to promote the public health, safety, morals or welfare, they will be invalidated if they constitute a taking; courts hold that private property may not be taken for public use under the guise of regulation (Anderson, supra, section 2.15).

The statutory limitations are both substantive and procedural. Probably the most significant substantive statutory limitation is the requirement that zoning must be in accordance with a comprehensive plan, which has been discussed above. Another is the requirement that zoning regulations be uniform for each class and kind of building within each zoning district (although, of course, they may vary from district to district). Procedural limitations are quite important; the requirements applicable to the adoption and amendment of zoning regulations and their administration and enforcement are set forth in detail in the statutes. Since they have no bearing on the inventorying of land use control powers, they will not be discussed here.

### Variances

The administration of zoning regulations is local, and involves the issuance of permits for uses by a ministerial official, and, for certain other uses, a discretionary review on a case-by-case basis against general standards (this latter procedure will be discussed below under Special Permits). No discussion of land use controls would be complete without a brief examination of variances, which, while they form a part of zoning administration, may bear substantially on the use of land.

A variance is a device which permits a use of land, or the placement of a structure, in a manner which is proscribed by or different from the restrictions imposed in the zoning ordinance or local law. The enabling statutes themselves do not define the term, but merely state that where there are practical difficulties or unnecessary hardships in the way of carrying out the strict letter of zoning regulations, the zoning board of appeals has the power, in passing on appeals, to "vary or modify" the provisions of the ordinance or local law (General City Law, § 81 (McKinney Supp. 1975-1976); Town Law, § 267 (McKinney Supp. 1975-1976; Village Law, § 7-712 (McKinney 1973)). The courts have over the years divided variances into two discrete parts, use variances and area variances, with the "unnecessary hardships" test applying to the former and the "practical difficulty" test to the latter. We will discuss them separately.

## 1. The Use Variance

The courts have ruled that in order to qualify for a use variance (an example of which would be a grocery store in a single-family residence district), the applicant must prove that the zoning regulations impose an "unnecessary hardship" upon him. Two tests must be applied by the zoning board of appeals, both of which must be met by the applicant: The land in question cannot yield a reasonable return from any use permitted by the zoning regulations; and the use to be authorized by the variance will not alter the essential character of the locality (Otto v. Steinhilber, 282 N.Y. 71 (1939)).

In addition to these two tests, the zoning board of appeals must also consider the effect of the variance on the zoning ordinance or local law itself, to make sure that the variance, if granted, is in keeping with the spirit and letter of the zoning regulations.

## 2. The Area Variance

An area variance has been defined as one which has no relation to a change of use - it is essentially a grant to erect, alter or use a structure for a permitted use in a manner other than that prescribed by the zoning regulations. The area variance is used where dimensional relief is to be granted. The test for the grant of an area variance is "practical difficulty", a much less rigid test than that governing use

variances. The test involves balancing the need for the variance with the possible harm it might cause, and alternative solutions (Wachsberger v. Michaelis, 19 Misc.2d 909, 191 N.Y.S.2d 621 (1959)).

### Special Permits

One of several devices which may be used for injecting a measure of flexibility into zoning regulations is the "special permit" control, sometimes also referred to as "special exceptions" and "conditional uses". But while it is of vital importance as another device for injecting flexibility into the operation of zoning ordinances, it is commonly misunderstood, often abused and frequently misapplied. The name "special exception" in fact is inaccurate and misleading - special permits are not exceptions to a zoning ordinance (as variances are) but rather are a device to impose conditions on permitted uses to protect the health, safety and welfare of the community.

It is important at the outset to recognize that variances and special permits are not the same, or even similar, although they are frequently confused, even in judicial decisions. We have seen that, simply stated, a variance permits a use of land otherwise prohibited by a zoning ordinance. A special permit is not in any sense an exception to the zoning ordinance, but instead allows conditions to be attached to certain uses already permitted by the zoning ordinance.

Just as it is recognized that the literal, strict enforcement of zoning ordinances may cause practical difficulties and unnecessary hardships which should be alleviated by varying the terms of the ordinance, it has also been found that additional flexibility is needed. There are many uses, permitted by zoning ordinances, which require special treatment. These range from the sacred to the profane, from churches and synagogues to gas stations and junk yards. Uses which are unquestionably desirable or necessary can cause problems. Churches, no matter how desirable, can cause traffic congestion at certain times; shopping centers by their very nature attract throngs of people; homes for the aged can cause undesirable impacts upon residential neighborhoods; country clubs, drive-in theatres and public utilities may produce crowds of people and traffic, and create noise. It is to solve this dilemma - the desirable and permitted use, which must be subjected to conditions so as to retain its desirable character and that of the area - that the special permit exists. When the legislative body of municipality finds that certain uses are desirable and should be permitted under the zoning ordinance, subject to certain conditions laid down to protect the intent of the zoning ordinance and the essential character of the particular district, the special permit device is brought into play.

The special permit power is of particular significance in geographic areas where it is desired to provide additional conditions - drafted with the character of that area in mind - to insure that development that does occur is compatible. The special permit device should be of special importance in the coastal zone area.

The power to grant special permits is a part of the municipality's general power to control land use, found in the enabling acts (General City Law, § 20(24) and 25) (McKinney 1968; Town Law, § 261 (McKinney 1965); Village Law, § 7-700 (McKinney 1973)). These statutes do not specifically mention the power to grant special permits, but the grant of power they do contain is broad enough to encompass them. Thus, it is clear that the legislative body itself may exercise the power to grant special permits. However, there is a specific provision in each enabling law which permits the delegation of the power to approve special permits to the zoning board of appeals. Each provides that the board of appeals: ". . . shall also hear and decide all matters referred to it or upon which it is required to pass under any such ordinance" (General City Law, § 81 (McKinney 1968); Town Law, § 267 (McKinney 1965); Village Law, § 7-712 (McKinney 1973)).

Of course, the zoning ordinance or local law itself will specify the uses which require a special permit and the standards that must be met before one may be issued, as

well as the districts in which special permit uses may be allowed. This would be so whether the legislative body or the board of appeals had the power to approve special permits.

#### Cluster Development

This is a subdivision technique, and is discussed in Part V below.

#### Planned Unit Development

This is a zoning technique permitting maximum flexibility in the development of land; because of its complexity it is treated separately, in Part VIII below.

#### Transfer of Development Rights (TDR)

This is a new technique under which a limited shift of zoning density from one part of a municipality to another would be permitted. It is discussed separately in Part IX below.

## V. SUBDIVISION CONTROL

The control of the subdivision of land is a major land use control measure available to municipalities. As such it is important to distinguish it from the other major land use control - zoning. Zoning and subdivision control are separate and distinct parts of the planning implementation process, but they complement each other, and taken together can insure well-ordered development. Both are exercises of a municipality's "police power". Zoning has as its principal purpose the prescription of what land may be used for. As discussed above, it accomplishes this by establishing different districts and providing for uses permissible in each (e.g., residential, commercial, industrial). Subdivision control, however, is concerned with how land is used - i.e., it attempts to insure that when development does occur, it will be accompanied by adequate services and facilities. While the two controls can work together, and probably should, for maximum benefit to the municipality, it is permissible under the statutes to have either without the other.

The power to control subdivision stems from enabling authority (General City Law, § 32 (McKinney 1968); Town Law, § 276 (McKinney Supp. 1975-1976); Village Law, § 7-728 (McKinney 1973; McKinney Supp. 1975-1976)) which authorize the municipal legislative body to, by resolution, ". . . authorize and empower the planning board to approve plats showing lots, blocks or sites . . . ." While there are

several cases which hold that a municipal legislative body may itself exercise subdivision plat approval powers, the usual procedure is for the planning board to be given this power.

Once a planning board has been granted the power to approve subdivision plats by the municipal legislative body, the usual procedure is for the planning board to adopt regulations to guide its review of plats which may be submitted for approval in the future. The statutes authorize such regulations and provide that: 1) the planning board must hold a public hearing on its proposed regulations, 2) the planning board must adopt the regulations, and 3) the adopted regulations must then be approved by the legislative body. The subdivision regulations serve two purposes. First, they should define the term "subdivision", since that term is not defined in the statutes. Second, they should prescribe the basic standards for improvements and services which will be required of a developer.

The procedure which must be followed by planning boards in reviewing and approving subdivision plats is quite specifically set forth in the cited statutes.

The purpose of subdivision control, as stated above, is to insure that when development does occur, it will be accompanied by adequate services and facilities. The statutes contain a "list" of general types of requirements that may be imposed upon a subdivider as a condition of plat approval (General

City Law, § 33 (McKinney 1968); Town Law, § 277 (McKinney Supp. 1975-1976); Village Law, § 7-730 (McKinney 1973)). Courts have been fairly strict in construing this "list", and the rule appears to be that if an improvement is not included within the statute, it may not be required. Among improvements that may be required under the statutes are the following:

- Parks and Recreational Land - The statutes authorize planning boards to require that a subdivider show, "in proper cases and when required by the planning board", a park or parks suitably located for playground or other recreation purposes. However, "if the planning board determines that a suitable park or parks of adequate size cannot be properly located in any such plat, or is otherwise not practical", it may require the subdivider to make a cash payment to the municipality, in lieu of showing such land on his plat. Thus, there are two ways of providing park facilities for a new subdivision: the subdivider may show park land on the plat, or he may be required to pay cash instead of showing such land.

- Streets and Highways - The statutes contain several provisions relating to various requirements a planning board may impose to insure the adequacy of the street system of a new subdivision. Planning boards may require that streets and highways be of sufficient width and suitable grade and suitably located to accommodate the prospective traffic, to

afford adequate light and air and to facilitate access by fire-fighting equipment. In addition, if there is an official map or a master plan, the planning board may require streets to be coordinated "so as to compose a convenient system conforming to the official map and properly related to the proposals shown by the planning board on the master plan." Grading and paving of streets may be required to be to town standards. Usually, these matters are handled by appropriate detailed provisions in the subdivision regulations.

It should be noted that there is nothing in the statutes which would authorize a planning board to require dedication of the streets put in by a subdivider. However, regardless of whether the streets in a subdivision are to be dedicated or to remain in private ownership, the planning board may insist upon their location and construction to the standards noted above.

- Conformity with Zoning Requirements - The Town Law section provides that if there is a town zoning ordinance, the planning board, in reviewing plats, may require that the lots shown thereon shall at least comply with the requirements thereof. The General City Law and Village Law sections are silent on this matter. However, it would appear that a village or city planning board, as well as that of a town, would be within its rights to deny approval to a plat which did not meet the zoning requirements. It would appear that in those municipalities which control subdivision but do not have zoning,

a planning board may not prescribe minimum lot sizes as part of its subdivision regulations. This power is included within the zoning power (General City Law, § 20(24) and (25) (McKinney 1968); Town Law, § 261 (McKinney 1965); and Village Law, § 7-700 (McKinney 1973)), and may, therefore, be exercised only by a municipal legislative body.

- Water, Sewer and Drainage Facilities - Among the most important improvements within subdivisions are those relating to water supply, sanitary and storm sewers and drainage.

Planning boards may, under the cited statutes, require such facilities to be constructed to municipal standards, as a condition of plat approval.

- Other Facilities - The statutes permit planning boards to require a long list of improvements that have not been discussed above: monuments (e.g., at street corners), street signs, sidewalks, street lighting standards, curbs, gutters, street trees, and fire alarm boxes are included. The statutes provide that the planning board may require that the above improvements be installed in accordance with standards, specifications and procedure acceptable to the appropriate municipal departments.

The statutory scheme of subdivision control is that planning boards may disapprove the plat unless either:

- 1) all required improvements have been completed by the developer in conformity with the municipal standards, or
- 2) a performance bond in an amount sufficient to cover the

cost of the improvements is provided by the subdivider. In the event that the subdivider fails to install the required improvements within the term of the bond, the municipal legislative body may declare the bond to be in default and collect whatever sum remains payable thereunder (i.e., it may be that the developer has completed part of the required improvements). Upon receipt of the proceeds, the municipality must install the improvements covered by the bond and commensurate with the extent of building development that has taken place.

The statutes recognize the fact that not all subdivisions will require the same kinds of improvements. Town Law, § 277, subdivision 2, provides that "in making such determination regarding streets, highways, parks and required improvements, the planning board shall take into consideration the prospective character of the development, whether dense residence, open residence, business or industrial." General City Law, § 33 and Village Law, § 7-730 contain substantially identical language. In addition, these statutes permit planning boards, in reviewing plats, to waive, subject to appropriate conditions, the requirements for such improvements "as in its judgment of the special circumstances of a particular plat or plats are not requisite in the interest of the public health, safety and general welfare." In towns, waiver may also occur where the planning board judges improvements to be inappropriate because of inadequacy or lack of connecting facilities adjacent

or in proximity to the subdivision. Under the provisions just discussed, a planning board might waive its requirements for curbs in the more rural area of the town, or modify its road-width requirements for rural subdivisions.

### Cluster Development

Background. Every standard zoning district has a pre-set density at which development will be permitted. For example, a standard district might require one-acre lots for single family dwellings. This density, then, is set forth in the text and on the map of the zoning ordinance, and may not be ignored. Cluster development is a means to permit, in conjunction with the approval of a subdivision plat, a transfer of this density, by grouping the development which is permitted under the standard zoning provisions within the tract of land. For example, if a given tract of land of 100 acres is zoned in such a way that 100 dwellings could be built on individual lots of one acre apiece, cluster development would permit these 100 dwellings to be grouped on, say, twenty acres, while the 80 acres remaining could be devoted to open space or recreational use.

It should be obvious that cluster development is a means of imparting flexibility to otherwise rigid lot-by-lot zoning regulations. Because it permits a developer to build at the prescribed zoning density for his land and, at the same time, to preserve open space, historic or scenic features, the

technique is particularly significant in the coastal zone context.

Although we have been using the term "cluster development" for the type of development just described, the proper term should perhaps be "average density development", since it is more general, and since cluster development is a fairly narrow term used by planners and architects to describe a design technique. Nevertheless, we have chosen to use "cluster development" since it is most commonly used to describe the legal device we are talking about.

The Statutory Authority. The enabling statutes permitting clustering are General City Law, § 37 (McKinney 1968); Village Law, § 7-738 (McKinney 1973); and Town Law, § 281 (McKinney 1965; McKinney Supp. 1975-1976). The three sections are dissimilar, and it will be helpful to examine the Town Law provision in some detail and then point out the differences among the three statutes.

The Town Law section empowers a town board to authorize the planning board to modify the provisions of the town zoning ordinance simultaneously with its approval of a subdivision plat. The end sought is a reduction in minimum lot sizes while retaining the density required by the zoning ordinance. It is important to note that while the section would permit density transfer within a given tract, it does not permit a violation of the average density ceiling otherwise applicable for that particular tract under the zoning ordinance. Thus,

the permitted number of dwelling units must remain the same as the number that would be permitted under the zoning ordinance if the land were subdivided in accordance with the minimum lot requirements thereof. If the land could be used for 100 homes on one-acre plots, the clustered development on the same tract could not exceed 100 homes.

The Town Law section is not limited to residential development; it may be used for clustering any type of development permitted for that tract by the zoning ordinance. If the underlying zoning for the district in which the subdivision is to be located permits more than one type of use, all such permitted uses may be clustered under Section 281. In the case of residential development, the dwelling units clustered may be in the form of detached single-family units, semi-detached, attached or multi-story structures; the decision is discretionary with the planning board, but it is subject to conditions set forth by the town board.

The Village Law provision differs from the Town Law section in that it is specifically limited to residential developments. The General City Law provision appears to contain limited authority for mixing uses in a clustered development. It reads in part:

"The owner of the land shown on the plat may submit with the plat a proposed building plan indicating lots where group houses for residences or apartment houses or local stores and shops are to be built."

Whether this language is authority for city planning boards to permit these mixed uses in a development located in a district that otherwise permits residential uses only is unclear. General City Law, § 37 permits the body creating the planning board to authorize it:

"... either to confirm the zoning regulations of the land so platted as shown on the official zoning maps of the city or to make any reasonable change therein and such board is hereby empowered to make such change."  
(emphasis supplied)

It should be noted that the Town Law and Village Law provisions permit modification, and not "any reasonable change" of the zoning. (When originally enacted in 1927, all three laws read as the General City Law now reads.)

Clearly, under these statutes, planning boards can be given a great deal of discretion on all facets of a proposed development project. This discretion could be given with regard to the location of buildings, the types of dwellings used, the design of the project and, where permitted, the location of mixed uses. This seemingly broad authority of the planning board is limited by two basic factors: first, the statutory prohibition against exceeding the density permitted by the zoning, and second, the local legislative body must authorize the planning board to exercise clustering powers, and it may impose conditions on such exercise of power.

Open Space. The treatment of the open space area or areas gained by the use of the cluster technique is of major

importance, since the primary purpose of clustering is to create this space. Town Law, § 281 and the Village Law, § 7-738 specifically provide that the planning board may, as a condition of plat approval, establish conditions on the ownership, use and maintenance of these lands in order to assure their preservation for their intended use.

This language raises the question - as yet unanswered by the courts - whether a planning board may require dedication of the open space to the municipality as a condition to plat approval in cluster development. Clearly, planning boards may not so require as a condition to plat approval if no clustering is involved in a subdivision. In such cases, Town Law, §§ 277 and 278, and Village Law, §§ 7-730 and 7-732 would apply, and these sections do not permit planning boards to require developers to dedicate lands for parks or recreational facilities. They merely authorize the requirement that developers "show" such lands on plats submitted for approval. A developer may, if he desires, offer to dedicate such lands to the municipality - indeed, his filing of a plat would constitute such an offer unless a notation was made that the lands were not offered for dedication - but a requirement that dedication occur is not permitted. It may be argued that since the language in the cluster provisions specifically authorizes the imposition of conditions on the ownership of open space lands as a prerequisite to plat approval under these sections, dedication may be required in cluster situations. As noted above, there are no court decisions which would either support or destroy this view.

An alternative to dedication of open space to the municipality is the establishment by the subdivider of a homeowner's association to manage the open space, which would remain in private ownership. This could be established privately, possibly through deed restrictions or covenants to insure that ownership of a dwelling in the clustered development would require membership in the association. These restrictions should prohibit any development other than for open space uses on the specified land. Both the general requirements for and the standards for establishment of such associations could be established by the planning board pursuant to its powers under Town Law, § 281 and Village Law, § 7-738 to establish conditions on the ownership and maintenance of open space in cluster developments.

The town board and the village board of trustees may retain control over these conditions on open space by requiring their own approval of the conditions established by the planning board to govern the ownership, use and maintenance of open spaces. It may require such approval of the arrangement made for each plat.

The subdivision enabling statutes permit municipalities to require developers to pay money in lieu of showing land for parks on their plats, if the planning board determines that a park or parks of adequate size cannot be properly located in the plat or is otherwise not practical (General City Law, § 33, Town Law, § 277, Village Law, § 7-730).

Can this procedure be used with cluster development? It would appear that the reason for permitting a municipality to require money in the circumstances described above disappears where clustering is permitted, because it is one of the very purposes of clustering to gain such land. There is one State Comptroller's Opinion which supports this conclusion that no money in lieu of land may be required in cluster situations (Op.St.Compt. 67-713). On the other hand, it could be argued that the intent of the sections cited above is to insure the provision of park and recreational land, while the intent of the clustering sections is to insure the provision of open spaces. If the two purposes could be distinguished it would appear that money could be required even in cluster situations.

Finally, no discussion of open space is complete without a discussion of General Municipal Law, § 247. This section grants to all municipalities the power to acquire open space. It is a broad power, and includes authority to acquire fee or less than fee interests by purchase, gift, grant, bequest, devise, lease or otherwise. The section is an eminent domain power, and thus contemplates payment, unless the land is given as a gift. The cluster provisions are police power authorizations, and merely serve to set aside land for open space. Thus, the two types of provisions can be used together to acquire land, or an interest in land, through clustering. For example, if clustering is used to achieve an open area, the municipality

could use General Municipal Law, § 247 to acquire it outright, or to acquire any lesser interest - such as a scenic easement, for example. The issues involved in dedication have already been discussed, but it should be noted here that a developer could dedicate less than the fee interest in open space lands, and under General Municipal Law, § 247, the municipality could accept such an interest.

## VI. THE OFFICIAL MAP

A valuable municipal device which combines the elements of planning and land use control is the official map.

The basic theory of the official map as a plan implementation device is that of using the police power to prevent development on land which will be acquired in the future for a public facility. Obviously, the cost to the public of acquiring land for roads, parks or other facilities is increased if the land is improved; possibilities of having to make undesirable adjustments in proposed facilities are also lessened if the land to be acquired is unimproved.

New York statutes (N.Y. General City Law, §§ 26, 29, 35-a (McKinney 1968); N.Y. Town Law, §§ 270, 273, 279 (McKinney 1965); N.Y. Village Law, §§ 7-724, 7-734 (McKinney 1973); and N.Y. General Municipal Law, §§ 239-g through 239-k (McKinney 1974)) provide for local and county official maps. The statutes pertaining to cities, towns and villages authorize the respective governing bodies to adopt and amend official maps showing the proposed future facilities (including existing and proposed streets, highways, parks and drainage systems). When this is done, the statutes prohibit the issuance of building permits within areas shown on the map as future roads only. Recognizing that such a prohibition could potentially work severe hardship on landowners, the law provides for the issuance of building permits to such landowners by the zoning board of appeals if the mapped land is not yielding a fair return.

The county official map may show existing and proposed county roads and drainage systems. In counties where the county or regional planning board has adopted a comprehensive master plan, there may also be included on the county official map rights-of-way required for any proposed transportation network and sites for any proposed county, state or federal development facilities, including parks, drainage and water courses and public buildings, whether such facilities would require the acquisition of fee or less than fee interests. Approval of the appropriate state or federal agency is required for their facilities to be included. As in the case of local official maps, building permits are prohibited within lands shown on a map. This prohibition is not limited to lands shown for roads, as it is in the case of local official maps - for county official maps, no permit may be issued within any land shown on such maps. However, if a landowner shows that land within a site shown on the county official map is not yielding a fair return, the local zoning board of appeals may issue the permit.

## VII. MISCELLANEOUS

### Regulation of Automobile Junk Yards

As is true with mobile home parks, automobile junk yards are many times confined to the least desirable sections of a municipality. Regulation of these uses is, therefore, important in those areas which are sought to be protected.

N.Y. General Municipal Law, § 136 (McKinney Supp. 1975-1976) provides that no person shall operate, establish or maintain a junk yard, as defined therein, until he has obtained a license and a certificate of approval from the municipality. The statute provides for licensing procedures and requirements, public hearings, location requirements and aesthetic considerations.

The statute further provides that new junk yards must be completely surrounded by an eight-foot fence which effectively provides screening and that motor vehicles and parts, as well as work on vehicles, be confined to the enclosure.

An important feature of § 136 is the provision that it shall not be construed to supersede local zoning regulations or other ordinances or local laws controlling junk yards nor shall it be deemed to apply to any municipality which has any ordinance, local law or regulation licensing or regulating junk yards.

### Regulation of Mobile Homes

Since it is a common practice for municipalities to provide for mobile home parks in less desirable areas, regulation of mobile homes could play an important part in protection of areas in or near tidal wetlands.

Towns are specifically authorized by N.Y. Town Law, § 130(29) (McKinney 1965) to regulate house trailer camps and the parking, storage and location of house trailers outside of established camps. Similar specific provisions in the former N.Y. Village Law were not carried over to the recodified N.Y. Village Law (McKinney 1973). The former section 89, which contained such specific authority (subdivision 69) was replaced by section 4-412 which provides general police powers and which presumably contains a sufficient grant of authority to regulate mobile homes.

A second method whereby a municipality may regulate mobile homes is pursuant to a zoning ordinance, under the authority of the planning and zoning enabling acts referred to under other sections of this inventory. Zoning ordinances are also exercises of the police power, promulgated in furtherance of the public health, safety and welfare. Such regulations must be reasonable and reasonably related to the end sought to be achieved. As has been held true of "trailer ordinances" referred to above, a municipality may regulate the placement of mobile homes and confine them to certain districts or to parks, but it cannot prohibit them completely.

## Legal Aspects of Historic Preservation

In order to focus on the appropriate authority for historic preservation, it will be useful to examine several forms which preservation efforts may take. The most obvious is preservation of an historic structure. Less obvious but becoming more popular are efforts to preserve entire areas or districts which consist predominantly of historic structures. Finally, there is the preservation of areas which, while they may not contain structures, are important due to events which have occurred there, or because of the role they once played in the community's past. Examples of this would include battlefields, Indian burial grounds, canal sites and waterfront areas.

Having decided upon preservation goals and objectives, a municipality will want to consider the ways of carrying them out. There are two basic types of authority which can be used to this end. The first is the power of outright acquisition of real property, which, while possibly expensive, is also a certain means of preservation. The second is the police power - the power to control private activities in the interest of the public health, safety and general welfare.

### Acquisition

Municipalities have broad powers to acquire real property for public purposes - N.Y. County Law, § 215 (McKinney 1972); N.Y. General City Law, § 20(2) (McKinney Supp. 1975-1976); N.Y. Town Law, § 64(2) (McKinney 1965); N.Y. Village Law,

§ 6-624 (McKinney 1973), including park and recreation purposes. It would appear that the acquisition of historic sites or structures could be accomplished under these provisions, even though they do not specifically mention such sites or structures, since there are ample public educational and recreational purposes to support such acquisition.

Aside from the above authority to acquire land for public purposes, N.Y. General Municipal Law, § 247 (McKinney 1974) authorizes broad acquisition of real property, or lesser interests therein, for open space purposes.

#### Police Power Regulation - The Statutes

It is not unusual for zoning ordinances to contain controls over historic structures. In addition, there are several specific grants of the police power which do relate to historic preservation.

Under zoning regulations provision is often made for the designation of specific historic sites, or entire districts, with specific requirements set forth. Regulations may also take the form of "overlay" districts - areas designated on the zoning map wherein the historic controls are in addition to those included in the underlying district.

In addition villages are specifically authorized to regulate and restrict certain areas as historic sites or landmarks.

What may well be the most important authorization for historic preservation controls can be found in N.Y. General Municipal Law, § 96-a (McKinney Supp. 1975-1976) which authorizes counties, cities, towns and villages, in addition to regulation by planning or zoning laws or local laws and regulations, to provide, by "regulations, special conditions and restrictions" for the protection, enhancement and perpetuation of, among others, places, districts and sites. It would appear that the statute includes not only police power controls, but eminent domain powers. Also, controls are authorized not only over the particular site, etc. being preserved, but also over the use and/or appearance of neighboring private property within public view.

Another police power authorization which may be of assistance in providing the basis for historic preservation controls is contained in N.Y. Municipal Home Rule Law, § 10(1) (a)(11) (McKinney 1975-1976). That statute provides that every county, city, town or village shall have the power to adopt and amend local laws relating to the protection and enhancement of their physical and visual environment. This is a broad authorization, and is not, of course, limited to controls for historic preservation purposes; however, it should prove to be a useful power, especially if controls are desired outside the framework of zoning ordinances.

## Flood Plain Regulations

The National Flood Insurance Act of 1968 (Public Law 90-448) was enacted to provide previously unavailable flood insurance protection to property owners in flood prone and mud slide areas. A community that wishes to qualify for the sale of federally subsidized flood insurance, pursuant to the Act, must agree to adopt and enforce control measures consistent with Federal criteria.

Thus a municipality has two reasons for measures regulating use of flood prone areas - protection of these areas from the ravages of floods and qualification for flood insurance.

The required "land use and control measures" necessary for municipal eligibility under the National Flood Insurance Program are specified in 24 CFR 1910.3. None of the minimum standards contained therein required a municipality to prescribe land uses or density of land uses (which would be accomplishable only through zoning). Section 1910.3(c)(4) requires applicants for permits to show that the proposed use "when combined with all other existing and anticipated uses" will not increase water surface elevation by more than a stated amount. This would seem to relate to density of uses (because it refers to existing and "anticipated" uses in a flood plain) and thus might be easiest to accomplish by zoning. Nothing in the regulations requires that the standard be achieved by zoning, however. Since there is no requirement that any limit be set on "anticipated" uses, no density control is required, and thus no zoning.

If there is some other way to demonstrate the effect of a proposed use on water elevation when considered with "anticipated" uses that alternative would appear permissible. Section 1910.3(d)(5) and (6) require prohibition of expansion of existing uses and establishment of new fills in floodway areas. These, too, may be easiest to accomplish through zoning, but other police power measures may accomplish the same purpose, since no land use or density prescription is called for. The other requirements of section 1910.3 pertain to subdivision control, floodproofing and building construction requirements, none of which require a zoning ordinance or local law.

If a zoning ordinance is desired, it must be town-wide (except for villages) or village-wide (Connell v. Town of Granby, 12 App. Div. 2d 177; Town Law, § 262-a (McKinney Supp. 1975-1976)). However, a zoning ordinance may provide for more detailed regulations in one portion of a municipality than another, as long as the controls are in accordance with a comprehensive plan. Town Law, §§ 262, 263 (McKinney 1965); Village Law, §§ 7-702, 7-704 (McKinney 1973).

The general thrust of the National Flood Insurance Program regulations is that any use is permissible in flood-prone areas as long as certain criteria pertaining to the construction and siting are met. These criteria, listed in section 1910.3(a) through (e) of the regulations, may be locally implemented by ordinances or local laws adopted under the general police powers of a municipality (Town Law, § 130(1), (2), (3), (15) (McKinney

1965); Village Law, § 4-412 (McKinney 1973; McKinney Supp. 1975-1976); Municipal Home Rule Law, § 10 (McKinney 1969; McKinney Supp. 1975-1976)). While these statutes are silent concerning whether these police power controls may be made to apply only to limited geographic areas of a municipality, it is our opinion that they may. A general rule applicable to the exercise of the police power is that it may describe certain objects or make certain classifications for purposes of regulation. Singling out particular conduct (in this case, construction in flood prone areas) for regulation is permissible if the distinction is a rational one (Carmichael v. Southern Coal and Coke Co., 301 U.S. 495 (1937); People ex rel. Farrington v. Mensching, 187 N.Y. 8 (1907)).

## VIII. PLANNED UNIT DEVELOPMENT

### Background

Traditional zoning is characterized by pre-set regulations, applicable to whole districts (uniform within the districts, pursuant to the enabling laws). This type of zoning is called "Euclidean" zoning because it was this type of zoning that was involved in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), the case in which the concept of municipal regulation of land use through zoning was found by the Supreme Court to be constitutional. Most zoning ordinances of today are similar to that approved in Euclid; most zoning today is "Euclidean". Typically, such zoning informs a property owner more or less precisely how he can use his land. It assumes that development will occur on a lot-by-lot scale, and regulates accordingly. Thus, we have setback, yard size, percentage of lot that may be occupied and minimum lot area regulations applicable within entire districts. Anyone who can meet the specifications listed in the ordinance is entitled as a matter of right to a building permit.

The simple and direct character of this type of zoning clearly informs the landowner as to what he can do with his property. Such an ordinance is very effective in regulating development activity to achieve a pattern of planned municipal growth.

There is an important element of certainty under such an ordinance concerning the use to which an owner may put his land, but the other side of the coin is marked "inflexibility".

There are a number of devices which can be used to relieve this inflexibility. Two have already been discussed in this inventory - the special permit and cluster development. The Planned Unit Development is a third.

A planned unit development is a diversified development project which does not fit the standard zoning regulations of a municipality, and which is developed as an entity in such manner as to promote a municipality's comprehensive plan. It is truly "planned" as a "unit". It does not fit the standard zoning regulations governing its district because it may provide for increased density and for uses not otherwise allowed in the district. For example, a single project might contain dwellings of several types, shopping facilities, office space, possibly even light industrial facilities, open areas, recreational areas - the possibilities are endless. It differs from the cluster development concept in that it is easily amenable to any mixture of uses and is not subject to any of the underlying zoning for the land involved. The concept of planned unit development, if extended sufficiently, would embrace new towns, although it is flexible enough to be used in regulating development on any size parcel of land.

### Planned Unit Development Procedures

There is no specific statutory authority in New York State pertaining to planned unit development. If care is taken, however, it may be utilized through either the rezoning process, a legislative act, or through the special permit process, an administrative act. Since special permits have already been discussed in this inventory, this discussion will focus upon rezoning to accomplish planned unit development.

Municipalities in New York State have broad powers to rezone land. In the planned unit development context, land would simply be rezoned to accomplish what the municipality felt to be an appropriate planned unit development for that land. Obviously, in any such rezoning, all procedural requirements regarding notice and hearing, county planning board referral, protests and the comprehensive plan would apply to a planned unit development amendment just as they would to any other.

To insure that a specific project rezoning will not be attacked on grounds that it constitutes spot zoning, two steps should be taken. First, standards should be set forth governing approval of future projects, and, second, adequate provision for planning board review of proposed projects should be required. The logical means of accomplishing both steps would be to enact a planned unit development section in the municipality's zoning ordinance, containing both general standards for such developments and the procedures for project review.

### Staging of Development

In the larger projects, a developer may wish to complete his project in stages, rather than attempting to work on all phases simultaneously. A number of practicalities tend to make such staged development more attractive to the developer. The community, of course, has an interest in seeing that the developer completes the project as specified, and does not leave the community after he builds the most profitable sections.

There does not appear to be any specific authority under existing enabling legislation for the staging of development, unless the development is in the form of a subdivision. In such instances (and this would include cluster development) town and village planning boards are authorized to permit the filing of approved plats in sections, as they may deem necessary to assure orderly development of the plat (Town Law, § 276, subdivision 7 (McKinney Supp. 1975-1976); Village Law, § 7-728, subdivision 3 (McKinney 1973)).

Aside from this situation, several cases indicate that staging might be accomplished under the zoning enabling acts and the general police power of a municipality. Westwood Forest Estates v. Village of South Nyack, 23 N.Y.2d 424 (1969) dealt with an absolute prohibition of multiple dwellings within a village because of the burden such development would place on the existing sewage treatment plant. The Court of Appeals held such prohibition invalid, as not properly related to the

purposes of zoning. But what is important about this decision for the purposes of an examination of the law relating to staging of development is the opinion of the Court that:

"This is not to say that the village may not, pursuant to its other and general police powers, impose other restrictions or conditions on the granting of a building permit to plaintiff, such as . . . granting of building permits for the planned garden apartments in stages."

Thus it would appear that by a reasonable application of conditions governing development within a project, a municipality could achieve staging. Such conditions might, for example, relate to water and sewer services, roads and certain utilities. They should bear a reasonable relationship to the goals of the project - these goals, in turn, should reflect the comprehensive plan for the development of the community.

## IX. TRANSFER OF DEVELOPMENT RIGHTS

### Background

One of the limitations of the zoning power is that it may not be used in a confiscatory manner. Zoning is not invalid if its effect is to diminish - even substantially - the use value of property. It cannot, however, operate to eliminate the use value of property. Courts usually say in such situations that private property may not be taken for public use without compensation under the guise of the police power.

There are, however, a number of planning goals which may be inconsistent with using land in such a way as to enable the owner to realize a reasonable return on his investment. The goals may relate to open space preservation, preservation of areas of particular scenic or environmental concern, preservation of historic structures and preservation of agricultural land. From a planning viewpoint, the uses which ought to be made of these lands might be strictly limited; but such limitations might, if implemented, prevent the earning of a reasonable return by the owner, and might be held to amount to a confiscatory "taking". (We hasten to point out that this result would depend upon the facts of the particular situation.)

Transfer of Development Rights, or TDR, is defined as the attaching of development rights (the right to develop land) to specified lands which are desired by the municipality to

be kept "undeveloped" to carry out any of the goals noted above, but permitting these rights to be transferred from that land, so that the development which they represent may occur someplace else. The someplace else would be lands for which more intense development would be acceptable. In some variations of the TDR idea, the land desired to be kept "undeveloped" may be prohibited entirely from using the development rights which it has been assigned - these rights would have to be transferred for the owner to realize any economic return. In other variations, the owner of the land desired to be kept "undeveloped" may actually use his development rights on that land, if he desires, instead of transferring them.

An example of how TDR works is as follows: Land in a "conservation" zoning district is zoned to permit one dwelling per acre. Land someplace else, such as a residential district, is zoned to permit one dwelling per quarter-acre. Under TDR, the right to develop 20 dwellings on 20 acres in the conservation district could be transferred to other land. (If it is, then the 20 acres in the conservation district could not be developed at all - its economic use value would have been realized by sale of the right to develop it.) The 20 dwelling units density could be added to the density already allowable in a tract in the residential zone. In that district, a 15 acre parcel would permit, under the quarter-acre zoning, 60 dwellings. But with the added development rights acquired from the conservation district (20 dwelling in this example), a total

of 80 dwellings could be constructed on the parcel in the residential zone.

Because it permits the transfer of the right to develop land (and thus permits some economic return without actually building on land) the TDR technique may prevent successful challenges to very restrictive zoning controls adopted in pursuance of the goals suggested above. It could also serve to minimize the chance that use variances may be granted in an area zoned for open space uses or other restrictive uses. (Application for a use variance would be an alternative to bringing suit to challenge the validity of a restriction felt by the landowner to be confiscatory.) One of the tests that must be met by an applicant for a use variance is that it is not possible to earn a reasonable return under any use permitted by the zoning regulations (Otto v. Steinhilber, 282 N.Y. 71 (1939)). Availability of some economic return through sale of development rights might prevent the owner from meeting this test.

#### Legal Issues

Having defined what TDR is, it must be emphasized that the technique has never actually been used in New York State, and, of course, it has never received any attention by our courts. There are a number of legal issues which the technique raises.

A. Lack of Specific Statutory Authority. There is no specific statutory authority in the New York State enabling legislation for TDR. (As an aside, it is noted that there is specific authority for cluster development, which involves transfer of density within a tract of land which is being subdivided. This differs from TDR in that the latter involves density transfer between parcels which are not contiguous and which may be in different ownerships.)

It is not likely that lack of specific statutory authority, by itself, would prevent the use of the TDR technique. There are other development control techniques for which no specific statutory authority exists, but which have received judicial approval, for example planned unit development (see Rodgers v. Village of Tarrytown, 302 N.Y. 115 (1951)) and, especially, the special permit procedure, which is in quite common usage in New York (see Rathkopf, The Law of Zoning and Planning, 3rd Ed., Chapter 54). In addition, the Court of Appeals has interpreted the land use powers of municipalities very broadly in upholding innovative approaches as permissible under the enabling statutes, as long as they are undertaken for the zoning purposes specified in the statutes (see Golden v. Planning Board of Ramapo, 30 N.Y.2d 359 (1972)).

B. Uniformity. The enabling statutes provide that zoning regulations "shall be uniform for each class or kind of buildings, throughout such district . . ." (they may, of course, vary among districts). General City Law, § 20(24) (McKinney

1968); Town Law, § 262 (McKinney 1965); Village Law, § 7-702 (McKinney 1973). The claim might be made that in the transferee zone (the zone where density is to be increased for parcels for which development rights are purchased) the land with the added density is treated differently from other land in that zoning district, thus violating the uniformity requirement.

It is not probable that this will prove to be a problem. The relevant question under the uniformity requirement is whether the zoning regulations apply equally to all owners in the district. With the TDR technique, they would, because all land in the zoning district would theoretically be open to the opportunity of increased density through purchase of development rights. There is an analogy to the special permit procedure - which permits listed uses in certain zoning districts, but only if they meet certain conditions specified in the zoning regulations (which might in certain fact situations prevent location of the special permit use at a particular site). Special permit procedures have been held not to violate the uniformity requirements because they apply equally to all land in the zoning district (Green Point Sav. Bank v. Board of Zoning Appeals, 281 N.Y. 534 (1939)).

C. Zoning and the Comprehensive Plan. The statutes require zoning to be in accordance with a comprehensive plan (General City Law, § 20(24) (McKinney 1968); Town Law, § 263 (McKinney 1965); Village Law, § 7-704 (McKinney 1973)).

It might be argued that the zoning regulations, in setting permissible uses and densities for land within the various zoning districts, reflect a comprehensive planning approach to those areas, and that intrusion of added density, while it might be permissible if made subject only to site conditions (as in a special permit procedure), is not in accordance with a comprehensive plan to the extent that it is made dependent upon what is in essence a private contract - an agreement between the owners of two parcels. A possible answer to a challenge on this ground might be that the TDR process is part of the overall comprehensive plan of the entire municipality, and that the technique should be examined in light of the municipal goals for preservation of certain areas while still permitting their owners a reasonable return.

It is not possible to predict the reaction of the courts to challenges to the TDR process on the grounds of failure to be in accordance with the comprehensive plan.

## X. COUNTY INVOLVEMENT IN LAND USE

As was noted earlier in this inventory, with very few exceptions, the power to control land use has been delegated to cities, towns and villages in New York State. The statutes do permit county and regional planning agencies to exercise a limited role in land use control, and this discussion will focus on that role. Generally, the establishment of county and regional planning agencies and the list of their powers are provided for under General Municipal Law, Article 12-B (McKinney 1974; McKinney Supp. 1975-1976). Aside from the power to prepare plans and make studies, there are four powers which closely relate to the local exercise of land use power; one such power involves, under certain circumstances, actual land use control powers by the county or regional planning agency.

### 1. County Official Maps

These have been discussed under the general subject of official maps, since their administration closely parallels that of locally-adopted official maps.

### 2. County Review of Zoning Actions

General Municipal Law, § 239-m (McKinney 1974) requires that any city, town or village which is located in a county with a county or regional planning refer certain zoning actions to such agency before taking final action. The zoning actions involved are the adoption or amendment of zoning regulations, and the issuance of special permits or variances.

Not every zoning amendment, special permit or variance need be referred. The statute requires referral only for those which would change the district classification of or the regulations applying to, or involve a special permit or variance affecting, real property within 500 feet from a city, town or village boundary, the boundary of any existing or proposed county or state park or other recreation area, or from the right-of-way of any existing or proposed county or state parkway, thruway, expressway, road or highway, or from the existing or proposed right-of-way of any stream or drainage channel owned by the county or for which the county has established channel lines, or from the existing or proposed boundary of any county or state owned land on which a public building or institution is situated.

The county or regional agency has 30 days from the receipt of the referred matter to report its recommendations to the referring municipal agency, with reasons for the recommendations. If the recommendation is for disapproval or modification, the municipal agency involved may act contrary thereto only by a majority-plus-one vote of all its membership, and after adoption of a resolution fully setting forth its reasons for the contrary action.

### 3. County Review of Subdivision Actions

General Municipal Law, § 239-n (McKinney 1974) contains a similar procedure for county review of subdivision plats which are being acted upon by a local agency (usually this would be the local planning board). Unlike section 239-m,

which applies throughout the State to all zoning actions covered, section 239-n applies only in those counties which elect to use it.

Section 239-n provides for referral to the county planning agency of those plats submitted by developers to local governments for approval, if they include real property within the same 500 foot areas noted in the discussion of section 239-m. As with section 239-m, section 239-n provides for county recommendations within 30 days and contrary local action by majority-plus-one vote.

#### 4. County (or Regional) Control of Subdivision

General Municipal Law, § 239-d(7) (McKinney 1974) permits, in certain circumstances, county or regional planning agencies to exercise approval powers over subdivision plats (in the same way that town planning boards may exercise such powers). The statute permits the county or regional agency to designate "county or regional subdivision control areas" in towns for this purpose, and to adopt subdivision regulations consistent with the Town Law section governing subdivision plat approval requirements. These regulations would become effective only upon approval of the board of supervisors of a county.

The county or regional subdivision regulations cannot apply, under the statute, in any town with a planning board which has plat approval power and subdivision regulations (unless the town board of that town had adopted a resolution consenting to the applicability of the county subdivision

regulations therein). They would apply in all other towns included in the subdivision control areas, and the county or regional planning board would exercise full subdivision plat approval powers in such areas.

While the county and regional subdivision control provisions apply to towns, the statute permits the governing bodies of cities and villages to request the county or regional planning agency to exercise its subdivision powers in their jurisdictions.

## Volume III

LAND RESOURCES MANAGEMENT AND PLANNING  
RELATED PROGRAMS OF THE NEW YORK STATE  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

## Sections G-M

Prepared By: Land Resources Planning Group

Office of Program Development, Planning and Research  
New York State Department of Environmental Conservation

September, 1976

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Sections C-F

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Introduction and Sections A-B

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AN EVALUATION OF SELECTED DEC PROGRAMS  
IN RELATION TO LAND RESOURCES MANAGEMENT IN THE CATSKILLS

Catskill Study Report No. 3

New York State  
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LAND RESOURCES MANAGEMENT  
IN THE CATSKILLS: ASSESSMENT AND RECOMMENDATIONS

Catskill Study Report No. 1

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